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MICHAEL RODAK, JR. CLERK

IN THE

Supreme Court of the United States

October Term, 1972.

No. 72-564

THE BOARD OF EDUCATION OF CENTRAL DISTRICT NO. 1 OF THE TOWNS OF ADDISON, CAMERON, RATHBONE, TUSCARORA, WOODHULL, THURSTON, ERWIN, LINDLEY and CANISTEO, STEUBEN COUNTY, NEW YORK; EDWARD J. BROWN, District Principal, Central School District No. 1; CARL PILLARD, Principal, Addison High School, and ROBERT ANDREWS, President of the Board of Trustees of Central District No. 1,
Petitioners,

v.

CHARLES JAMES,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

HARRY TREININ,
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Corning, N. Y. 14830
607 962-3167.

Dated: September 29, 1972.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972.

THE BOARD OF EDUCATION OF CENTRAL DISTRICT NO. 1 OF THE TOWNS OF ADDISON, CAMERON, RATHBONE, TUSCARORA, WOODHULL, THURSTON, ERWIN, LINDLEY AND CANISTEO, STEUBEN COUNTY, NEW YORK; EDWARD J. BROWN, District Principal, Central District No. 1; CARL PILLARD, Principal, Addison High School, and ROBERT ANDREWS, President of the Board of Trustees of Central District No. 1,

Petitioners,

v.

CHARLES JAMES,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

The petitioners, the Board of Education of Central District No. 1 of the towns of Addison, *et al.*, pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on May 24, 1972.

Opinions Below.

The opinion of the Court of Appeals, 461 F. 2d 566, appears in the appendix hereto. The opinion rendered by the District Court for the Western District of New York also appears in the appendix.

Jurisdiction.

The judgment of the Court of Appeals for the Second Circuit was entered on May 24, 1972. A timely petition for rehearing *en banc* was denied on July 12, 1972, and this petition for certiorari was filed within 90 days of that date. This court's jurisdiction is invoked under 28 U.S.C. 1254(1).

Questions Presented.

1. Does a teacher have a constitutional right to wear an emblem expressing his personal political views on an emotionally-charged political issue dividing the country, contrary to his own professional Code of Ethics and the direction of the Commissioner of Education in a class where he is teaching English poetry, without presenting the entire range of information available in relation to such issue?

2. Is a determination of the New York State Commissioner of Education on a hearing instituted by the respondent in which all of his constitutional rights were presented *res adjudicata* in this case where he is proceeding *de novo* without having sought a review of the Commissioner's decision either in the state or federal courts?

3. Was a substantial federal question presented to the court below?

Statement of the Case.

The events which give rise to this action arose in conjunction with the observance of the Viet Nam Moratorium Days on November 14 and December 12, 1969.

In countless cities across the land, demonstrations against the policy of the government in reference to its conduct of the Viet Nam War were taking place. Stories

of the demonstrations monopolized the news media. Every television news broadcast gave priority to pictures and reports of the demonstrations in our cities. The events were headlined in our newspapers. Never before had Washington witnessed so huge a crowd gathered to protest action of our Government.

There was demonstrated a great division of our people.

It is in this context—a nation divided—protest throughout the land—noisy clamor on the part of many against the Government—equally as many, if not more, determined that the action of the Government be upheld—that respondent's actions must be judged.

On the first Moratorium Day, respondent, a probationary, teacher, appeared before his English class wearing a black armband.

Mr. Pillard, the school superintendent, asked that the armband be removed. Respondent refused. He was asked to see Mr. Brown, the district principal.

Mr. Brown explained to Mr. James that he considered the wearing of the black armband a symbol constituting political activity; that he thought it unethical for Mr. James, as a teacher, to use the school as a forum for expressing his personal political views, either symbolically or vocally.

Respondent was assured that there was no question as to his right to hold the political views which he apparently held or to participate in any political activities he might desire when not on duty as a teacher; that there was no question but that teachers could and should

discuss controversial issues in school when they were timely and pertinent to the course being taught, but that the right, so exercised, also carried with it the obligation to present, objectively, all known points of view on the issues. That, even then, the teacher could let it be known what his personal views were, if he pointed out and emphasized the rights of others to hold opposing views.

Mr. Brown further pointed out that, in his opinion, the wearing of the armband would tend to be disruptive and encourage pupils to engage in disruptive demonstrations; that the action would have a divisive effect on teachers.

Mr. James refused to remove the armband and was informed that he was suspended (App. 21a-24a).

After a meeting held the next day, the Board of Education sent a letter to Mr. James (App. 33a).

It stated:

> "The Board deems your action to be a political act. As such, it is prohibited in the school. It is also deemed unethical action on the part of a teacher to engage in such activities.
>
> "You may return to class on Monday, November 17th, 1969, with the understanding that you engage in no political activity while in the school.
>
> "Of course, the Board recognizes fully your absolute right to express outside of the school any beliefs that you may have."

Respondent returned to his duties on Monday, November 17th, 1969. He voiced no disagreement with the conditions for his return as set forth in the letter.

Thereafter, on the second Moratorium Day on Friday, December 12th, 1969, without any explanation or notification to the Board, Mr. James again wore an armband. He was asked to remove it. Upon his refusal to do so, he was suspended.

Under the authority of and in compliance with the provisions of Section 3013 of the Education Law of the State of New York, upon recommendation of the District Superintendent, the Board of Education dismissed Mr. James.

Mr. James petitioned the New York State Commissioner of Education for reinstatement. This was denied (App. 25a).

Thereafter, he brought this action invoking jurisdiction under Title 28 J.S.C. 2201 *et seq.* and Title 28 U.S.C. 1983 *et seq.* (App. 3a).

Reasons for Granting the Writ.

1. The determination in the court below affects the rights and obligations of every teacher in the public schools in the United States as well as the nature of the education that may be received by the pupils.

The decision herein affects the nature of the educational process to be permitted in the classroom.

The decision validates the action of a teacher in a classroom espousing a political position at the time of intense political turmoil involving an issue on which the position was taken.

This court in *Tinker v. Des Moines Independent Community School District*, 89 Sup. Ct. 733, page 74, recog-

nized that the black arm bands were worn by the children in that case.

> "• • • to exhibit their disapproval of the Vietnam hostilities and their advocacy of a truce, to make their view known, *and by their example, to influence others to adopt them.*"[1] (Italics supplied.)

Thus, as far as can be found, for the first time a decision has been rendered determining that it is permissible for a teacher in a junior high school to express his partisan position on a political issue dividing the country. More important, approval is given to the display of partisanship under circumstances which do not afford the opportunity to discuss the issues involved or the expression of other views on the issue presented.

We have action sanctioned which was contrary to the Code of Ethics adopted by the New York State Teacher's Association.[2]

---

[1]In his reply in the proceeding before the Commissioner, "(Respondent) admits and alleges that the wearing of the armband by respondent was a symbol of an opinion of (respondent) and was intended to convey to all who cared to observe the opinion and association of the (respondent) with respect to the acts of the administration of the Government of the United States and its conduct of the war in Viet Nam, but denies each and every allegation in paragraph 12 of the answer, including, but not limited to, the allegation that the wearing of the armband was partisan politics, including the allegation that the wearing of the armband was contrary to the ethics of the teaching profession and that the wearing of the armband constituted improper conduct on the part of the respondent."

[2]"4. The teacher and the school board recognize their obligations to develop growing appreciations and understanding of the principles of democracy; *they refrain from using the school to promote personal views on religion, race or partisan politics*"

The action was also in violation of a directive of the New York State Commissioner of Education issued in anticipation of the observance of the Moratorium Days (p. 34a, App.).[2]

Counsel could only find two cases in which the rights of the teacher in the classroom in relation to the discussion of a political subject was determined.

(footnote continued):

(p. 8, Code of Ethics, Their Interpretation and a Bill of Rights for Teachers). (Italics supplied.)

"In fulfilling his obligation to the student, the educator:

"1. Shall not, without just cause, restrain the student from independent action in his pursuit of leaning and *shall not, without just cause, deny the student access to varying points of view.*" (Italics supplied.)

"2. Shall not deliberately suppress or distort subject matter for which he bears responsibility."

COMMITMENT TO THE PUBLIC

"In fulfilling his obligation to the public, the educator:

"4. Shall not use institutional privileges for private gain or to *promote political* candidates *or partisan* political activities." (Italics supplied.)

"31. The professional teacher exercises good judgment in political activity. He properly may urge friends and acquaintances to support school bond issues or to vote for candidates in any election. *The use of school time or school premises for partisan political activity is improper*" (p. 17, Code of Ethics). (Italics supplied.)

[2]After discussing the problem of whether or not school should be closed on Moratorium Days, it gave its attention to the manner in which any special activities related to the significance of the day should be carried on. The directive continued

"We would recommend that consideration be given to the following factors:

• • •

In *Goldsmith v. Board of Education,* 66 Cal. App. Div. 157, 255 Pac. 783 (1924), the court in upholding the suspension of a teacher, used the following language:

> "It is to be observed that the advocacy before the scholars of a public school by a teacher of the election of a particular candidate for a public office introduces into the school questions wholly foreign to its purposes and objects; that such conduct can have no other effect than to stir up the students over a contest for a political office, and the result of this would be inevitably to disrupt the required discipline of a public school."

Recently, the subject was considered in *Goldwasser v. Brown,* 417 F. 2d 1169, cert. den. 397 U. S. 922. Plaintiff was dismissed for discussing foreign policy and racial prejudice in his classes.

The dismissal was upheld despite the claim that it interfered with plaintiff's right to free speech.

The court pointed out that appellant was fired for what he said *within* the classroom; that his job was to teach foreign officers English—not current events, political science, sociology or international relations (p. 1177). In our case, also, appellant was engaged in teaching English.

(footnote continued):

> "3. *The school posture should be neutral and objective. Administrators and staff members should avoid taking positions* on controversial matters which may reflect on the objectivity of the school.
>
> "4. If controversial statements are to be made by others, *efforts should be made to assure that all sides of the question are given appropriate attention.*" (Italics supplied.)

In its decision, the court defined the competing interests of the parties as follows:

> "Government's interest as an employer is in heightening the level of the public service it renders by assuring the efficiency of its employees in the performance of their tasks; and efficiency comprehends the maintenance of discipline, the prevalence of harmony among co-workers, and the elimination of conduct which may reasonably be thought to have 'impleaded the proper performance' by a teacher of 'his daily duties in the classroom.'
>
> "Conversely, the free speech interest of the teacher is to have his say on any and every thing about which he has feelings, provided there is no significant likelihood of his impairment of his efficiency" (p. 1176).

The court held:

> "• • • observations on Vietnam • • • would appear to have, at best, minimal relevance to the immediate classroom objectives."

The court stresses that appellant was fired for what he said *within* the classroom— and not for airing his views outside the classroom to anyone who would listen.

Thus, we have a situation parallel to our case and the distinction from the *Tinker* case pointed out.

The net result of the decision below is that a teacher is permitted to express his political beliefs in the absence of discussion of those beliefs or of an opportunity for the expression of other views on the issue presented.

That it was done silently and without comment makes it all the more objectionable. Literally, a placard es-

posing a political cause is placed before the students, and given the imprimature of the teacher; no comment is made and no discussion that might lead to the exposure of differing views is invited.

With the well-known inclination of youngsters to emulate their teachers and follow their examples, the effect of this display of the teacher's political position requires no further comment.

In its decision in the court below, the court started its analysis of the *Tinker* case with the quotation that neither students nor teachers "shed their constitutional rights to freedom of speech or expression at the school house gate," 292 U. S. at page 506.

From this starting point, the entire decision apparently proceeds on the premise that the position of the teacher and the pupil in reference to the right of free speech is identical. Little cognizance is given to the fact that once beyond the school house gate, pupil and teacher assume entirely different roles; that the student, by law, is required to attend; that the teacher is hired to teach—English in this case. Sight is lost of the fact that the teacher in the classroom is the representative of the Board and occupies a position of authority; his words carry weight and his examples are to be followed. While the student is accepting learning, the teacher is imparting education. By acting as he did, Mr. James violated not only the Code of Ethics of his profession and the directive of the Commissioner of Education, but the very essence of the American educational system • • • "to present a fair summary of the entire range of opinion so that the student may have complete access to all facets and phases of the subject." Commissioner of Education Decision (p. 30a, App.).

It is to be noted, that in the *Tinker* case, the decision specifically pointed out that

> "* * * there is here no evidence whatever of petitioners' interference, actual or nascent, with the schools work or of collision with the right of other students to be secure and to be let alone. Accordingly, *this case does not concern speech or action that intrudes upon* the *work of the school* or *of the right* of other *students*." 89 Sup. Ct., p. 733. (Italics supplied.)

Apparently, the court below equates "interference" with "the school's work or collision with the rights of other students" in connection with the necessity of a showing of a forecast of "substantial disruption of or material interference with school activities * * *" (p. 3247).

The function of the school is to teach its students. Disruption of its functions is not brought about by physical violence alone. Much greater violence can be done to the educational process by the improper exercise of the teacher's duty—to teach; to teach all relevant points of view on a controversial subject—not to project his personal opinion to the exclusion of all others.

Disruption of the educational process is not by riot alone. At worst, that is transitory. More damage can be effected by indoctrination of personal political belief. The damage is more subtle and longer lasting.

An interesting sidelight on this phase of the case was afforded during argument in the Circuit Court. During discussion as to whether a showing of physical disruption was required to be shown, petitioners' counsel inquired, "Do we have to wait until the house burns down before we can call the fireman?"

One of the judges, placing his head in his hands replied, "Counsel, under the first amendment cases, I am afraid you are right."

If that be the state of the law, applicable to the classroom situation, a persuasive argument for the grant of this petition is presented.

The heart of the educational issue presented in this case was well stated by the Commissioner of Education of the State of New York in his decision on the appeal of Mr. James in which the position of the school board was upheld. There the Commissioner stated (p. 30, a, App.):

> "It is a matter of fundamental educational policy that whatever subject of instruction may be involved, the teacher must present the entire range of information available in relation to such subject. *If the subject matter involves conflicting opinions, theories or schools of thought, the teacher must present a fair summary of the entire range of opinion so that the student may have complete access to all facts and phases of the subject.* Petitioner, in this case, in wearing the black arm band in his classroom was presenting only one point of view on an important public issue on which a wide range of deeply held opinion and conviction exists." (Italics supplied.)

The decision of the Commissioner was in conformity with the memorandum previously sent by the Commissioner's office in reference to the conduct of schools on Moratorium Days and with the Teacher's Code of Ethics.

The conflict presented in this case between the extent of the rights of teachers to freedom of personal expression in the classroom, the nature of the obligation of teachers as to teaching duties, the rights of students as

to what they are to be taught; the very essence of our educational system are involved in the determination of this case. It is respectfully submitted, the problems deserved the attention of the court.

If for no other reason, this court should pass on the case to expunge from the record the statement by the court below at page 3248, that

> "a principal function of all elementary and secondary education indoctrinative—whether it be to teach the ABC's or multiplication tables *or to transmit the basic values of the community.*" (Italics supplied.)

To claim that education is indoctrinative immediately brings to mind the systems of education of Communist Russia, Nazi Germany or Facist Italy.

Particularly is this so if we accept the definition of indoctrination by Dewey, one of the great philosophers on the American educational scene. He stated that

> "I shall take indoctrination to mean the systematic use of every possible means to impress upon the minds of pupils a particular set of political and economic views to the exclusion of every other" (*Education Today,* Putnam, 1940, p. 356).

Quite to the contrary, the function of American education has always been considered to train the mind to evaluate, to discern, to receive as much information on any given subject as is available and then to be so trained as to be able to choose what to the individual is the more valid choice. For no other reason, certiorari should be granted so that this court may have an opportunity to reject the intimation of the court below and to restate the function of American education as described in *Wieman v. Updegraff,* 344 U. S. 185, page 196:

> "It is the special task of teachers to foster those habits of open mindedness and critical inquiry which alone make for responsible citizens, who in turn make possible an enlightened and effective public opinion. Teachers must fulfill their function by precept in practice by the very atmosphere which they generate; *they must be exemplars of openmindedness and free inquiry.*" (Italics supplied.)

Or, as stated, conversely, in *Epperson*, 393 U. S. 97 (1968):

> "There is, and can be no doubt, that the First Amendment does not permit the State to require that the teaching and learning must be tailored to the principals or provisions of any religious sect or dogma."

Can it be denied that if the state required that Mr. James wear the black arm band on the Moratorium Days that such action on the part of the state would be unconstitutional? Why should a teacher, on his own volition, have the same authority to affect the education and thinking of his students that would be denied him if he were acting in his capacity as an agent of the state? The reason for the action—whether state directed or teacher inspired is of little moment. The action taken is the same. The result from the point of view of the student is equally objectionable.

Or, as stated in *Barnett*, 319 U. S. 624, 637:

> "Free public education if faithful to the ideal of secular instruction and political neutrality will not be partisan or enemy of any class, creed, party or faction."

In effect, the decision below gives a teacher the right to wear any symbol, expressive of any political view,

without hinderance. Granting a teacher the right to wear a black arm band as a symbol of opposition to government action is to start on a course that may lead to disaster in our schools.

Once that right is granted, the right could not be denied to others who agree with plaintiff. Then, a similar right must be granted to those who disagree with plaintiff and his adherents.

Let us assume that we have a school with fifty teachers. Ultimately, we may have twenty-five who favor one course of political action with possibly the other twenty-five proclaiming an opposite point of view.

Is that the setting that is desirable for the operation of a school or for the education of our children?

The issue can then be extended beyond Vietnam. The question of race could be so debated. Who could then deny the Black Panther the right to wear the symbol of his cause or the Ku Klux Klan member the right to wear the symbol of his political faith or social belief.

Could we then deny the Nazi the right to wear his swastika or the Communist his hammer and sickle?

This is what is involved in this case—The integrity of the schoolroom—Whether or not the school should become a battleground for opposite political faiths each seeking adherents not only on the faculty but, above all, in the classroom among the students.

Already, we are witnessing in some of our schools the sorry spectacle of policemen patrolling the corridors to keep the peace between opposing groups of students.

No action should be taken which may pave the way for the possibility that we multiply the issues requiring such action.

The power and influence of a symbol was recognized in the New York case of *O'Connor v. Hendrick* (184 N. Y. 421).

The Court of Appeals had before it the question as to whether a Catholic Nun should be permitted to teach in a public school while wearing a distinctive religious garb.

The Commissioner promulgated an order prohibiting teachers from wearing the costume in question while engaged in the actual work of teaching.

What the courts there said about the religious garb is equally applicable to the black arm band worn by respondent.

> "There can be little doubt that the effect of the costume worn by the Sisters of St. Joseph's at all times in the presence of their pupils would be to inspire respect if not sympathy for the religious denomination to which they so manifestly belong. To this extent, the influence was sectarian even if it did not amount to the teaching of denominational doctrine" (p. 428).

To paraphrase—by the same token, the wearing of his symbol by respondent would inspire respect and sympathy for his belief even if it did not amount to the teaching of political doctrine.

Discussing the reasonableness of the regulation of garb worn by teachers, the court makes a statement peculiarly apt to the facts in this case.

> "So also, it would be manifestly proper to prohibit the wearing of badges calculated on particular occasions to constitute cause of offense to a considerable number of pupils. For example, the display of orange ribbons in a public school in a Roman Catholic community on the 12th of July" (p. 429).

No one argues against the discussion of the issues of the Vietnam War or any other political issues in our schools. They should be argued and discussed—discussed fully and completely in the proper classes and at the proper times by teachers acting as teachers and not by teachers acting as partisans.

Mr. James advertised a political position. That is what made his actions objectionable. For the arm band, like the billboards or the newspaper ad, is the projection of an idea. It propels its message—it asks no comment in return and it invites no discussion. It states its position repeatedly, and in the classroom the student does not possess the option to put the newspaper aside or to click off the television set.

2. The determination of the Commissioner of Education of the State of New York should be considered *res adjudicata*.

Originally, Mr. James appealed to the Commissioner of Education of the State of New York. That appeal arose out of the same circumstances as the present case.

On the appeal, before the Commissioner, however, appellant did not mention the free exercise of religion.

When he sought legal relief, Mr. James had a choice: (1) to appeal to the Commissioner; (2) to take his case

directly to the New York Supreme Court; (3) to take his case directly to federal court.

On his own free choice he elected to petition the Commissioner.

In this case, Mr. James is not seeking to review the decision of the Commissioner. He is proceeding *de novo* as if the proceeding before the Commissioner has never been held.

The district court held that since the plaintiff did not appeal from the Commissioner's decision, as he had a right to do, but instead brought this action, that "the questions raised by the complaint in this action are *res judicata*" (p. 66a, App.).

Taylor v. New York City Transit Authority, 309 F. Supp. 785, aff'd 433 F. 2d 665 (2nd Circuit, 1970), specifically referred to the New York State Education Law, Section 310, under which Mr. James proceeded, refers to the available election of remedies and holds that such judicial decisions are final, precluding action in the federal courts.

If the Commissioner's action is found to be arbitrary or capricious appeal could be had to the New York courts, *Bond v. Dentzer* (NDNY), 325 F. Supp. 1343.

One cannot reinstitute the same cause of action against the same individual, based on the same array of facts, merely by changing legal theories and sovereignties. *Howe v. Brown*, 426 F. 2d 300. See, also, *Nelson v. Los Angeles County*, 362 U. S. 1, 9.

> "The Civil Rights Act does not permit a second bite at the cherry." *Lackawanna Police Benevolent Association v. Balen*, 446 F. 2d 52.

3. The "serious adverse effects on the New York State school system" of the decision below foreseen by the Commissioner of Education of the State of New York warrant review by the court.

The New York State Commissioner of Education has been permitted to join an *amicus curiae* by the District Court. Both there and in the Circuit Court, briefs have been filed on his behalf. The effects of the decision below on the educational system as visualized by the man who heads the system is forcefully set forth in a letter by his counsel addressed relative to a petition for a rehearing *en banc*. The letter is appended to this petition.

The fact that the chief education officer of the State of New York claims that the decision will have "serious adverse effects on the New York State School system," by itself, is sufficient to warrant the granting of the petition.

4. Previous decisions of the Supreme Court indicate the absence of a substantial federal question.

The decision in the *Goldwasser* case, 417 Fed. 2d 1169, cert. den. 397 U. S. 922, denies the right of a teacher in the classroom to propagandize his personal views on political and social issues, disposes of the issues presented.

Likewise, the decision on *West Virginia v. Barnett*, 319 U. S. 624, in which it is stated:

> "That no official • • • can prescribe what shall be orthodox in politics • • •"

and that

> "* * * free public education * * * will not be partisan or enemy of any class, creed, party or faction"

corroborates that contention.

Even in the absence of any compelling reasons for the observance of neutrality in the propagandizing of personal political views (as are present in the case under review), the freedom to the expression of one's views has been restricted.

> *Adderley v. Florida*, 385 U. S. 39, 87 S. Ct. 242 (1966);
> *Cox v. Louisiana*, 379 U. S. 536 at 554-555, 85 S. Ct. 453, 379 U. S. 559 at 563-564, 85 S. Ct. 476.

No substantial federal question was presented by the claim of want of due process in the dismissal without a hearing of a non-tenure teacher.

> *Board of Education v. Roth*, 405 U. S. —, 92 S. Ct. 2701;
> *Fenton v. Boston School Board Committee*, 26 N. E. 2d 676, cert. den. 401 U. S. 929.

Conclusion.

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

Dated: September 29, 1972.

Respectfully submitted,

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APPENDIX.

Opinion and Judgment of the United States Court of Appeals.

UNITED STATES COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

No. 697—September Term, 1971.

(Argued May 5, 1972 Decided May 24, 1972.)

Docket No. 72-1109

CHARLES JAMES,

Appellant,

v.

THE BOARD OF EDUCATION OF CENTRAL DISTRICT NO. 1 OF THE TOWNS OF ADDISON, CAMERON, RATHBONE, TUSCARORA, WOODHULL, THURSTON, ERWIN, LINDLEY AND CANISTEO, STEUBEN COUNTY, NEW YORK; EDWARD J. BROWN, District Principal, Central District No. 1; CARL PILLARD, Principal, Addison High School, and ROBERT ANDREWS, President of the Board of Trustees of Central District No. 1,

Appellees.

Before:

Kaufman, Anderson and Mansfield,
Circuit Judges.

Appeal from an order of Judge Harold P. Burke in the United States District Court for the Western District of

New York summarily dismissing a high school teacher's complaint under 42 U.S.C. §1983, which alleged that school officials violated his constitutional rights by discharging him because he had worn a black armband in class.

Reversed and remanded.

Burt Neuborne, New York, N. Y. (New York Civil Liberties Union, of counsel), for Appellant.

Harry Treinen, Corning, N. Y. for Appellees.

John P. Jehu, Albany, N. Y., for Commissioner of Education of the State of New York, *Amicus Curiae.*

KAUFMAN, Circuit Judge:

The first amendment proscription against any law abridging freedom of expression, perhaps more than any other constitutional guarantee, frequently brings into sharp focus the inexorable tension between enduring concerns for individual freedom and the authority required to preserve the democracy so crucial to realizing that freedom. For several decades, the courts have struggled with principles and concepts necessary to strike a functional balance between protected speech and the government's legitimate interest in protecting our democracy.[1]

The Supreme Court has more than once instructed that "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Shelton v. Tucker,* 364 U. S. 479, 487 (1960), quoted in *Keyishian v. Board of Regents,* 385 U. S. 589, 603 (1967); *Tinker v. Des Moines Independent Community School District,* 393 U. S. 503, 512 (1969). Rightly called the "cradle of our democracy," our schools bear the awe-

[1] *See generally,* Kaufman, *The Medium, the Message and the First Amendment,* 45 N.Y.U.L. Rev. 761 (1970). (The James Madison Lecture.)

some responsibility of instilling and fostering early in our nation's youth the basic values which will guide them throughout their lives. Appellant is quick to agree that we cannot tolerate undisciplined, coercive, intimidating or disruptive activities on the part of teachers or students which threaten the essential functions of our schools, and that such conduct requires a disciplinary response. But, the issue in this case is whether, in assuming the role of judge and disciplinarian, a Board of Education may forbid a teacher to express a political opinion, however benign or noncoercive the manner of expression. We are asked to decide whether a Board of Education, without transgressing the first amendment, may discharge an 11th grade English teacher who did no more than wear a black armband in class in symbolic protest against the Vietnam War, although it is agreed that the armband did not disrupt classroom activities, and as far as we know did not have any influence on any students and did not engender protest from any student, teacher or parent. We hold that the Board may not take such action.

The facts essential to a resolution of the conflicting interests are undisputed. On June 7, 1969, Charles James was employed as an 11th grade English teacher at Addison High School, located near Elmira, New York. He previously had taught in the New York City public schools. After moving to the Elmira area, James, a practicing Quaker, joined the Elmira Meeting of the Religious Society of Friends.

When November 14 and December 12, 1969, were designated as "moratorium" days by the opponents of the Vietnam War, the Elmira Meeting determined to observe the two days by wearing black armbands.[2] On November

[2]In a statement signed after James had been dismissed, the members of the Elmira Meeting explained their motivation:

> It is from this religious context [Quaker belief in the futility and immorality of war] that Charles James drew

14 James affixed one of the armbands, which had been prepared by the Meeting, to the sleeve of his jacket. He since has stated that he "resolved to wear one of the black armbands as an expression of [his] religious aversion to war in any form and as a sign of [his] regret over the loss of life in Vietnam."

Shortly after school began that day, Carl Pillard, the Principal, entered James's homeroom, noticed the armband, but made no comment. Pillard waited until midway through the second period when James was teaching poetry, apparently without any incident or discussion whatsoever relating to Vietnam or the armband, to summon James to his office and to request him to remove the armband. When James refused to remove it, Pillard sent him to the District Principal, Edward J. Brown. Brown ordered James to remove the armband or risk suspension or dismissal because the armband constituted a symbolic expression of his political views.[3] In addition, Brown

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(footnote continued):

> his moral imperative to act as he did, in wearing a black armband—symbol of sympathy and mourning for the dead —on those days accepted nationally as the time to demonstrate for peace and for an end to the killing in Vietnam. His action was as one member of this meeting, along with other members, who chose out of the same deep convictions to wear a black armband all and every day of the moratoriums.

[3]Brown apparently assured James that there was no question as to his right to hold political views or to participate in political activities outside of school. Controversial issues, he said, should not be discussed in school unless they are relevant to the subject matter being taught and all points of view are objectively presented. He relied in part on a letter of November 3, 1969, from Herbert F. Johnson, Deputy Commissioner of the Department of Education of New York, which set forth the Department's policies with respect to the upcoming moratorium days: "The school posture should be neutral and objective. Administrators and staff members should avoid taking

feared that "wearing the armband would tend to be disruptive and would possibly encourage pupils to engage in disruptive demonstrations." When James again refused to remove the armband, Brown summarily suspended him and ordered James to leave the school at once.

The following day James received a letter from the Board of Education of Central District No. 1, reinstating him on "the understanding that [he] engage in no political activities while in the school."[4] James resumed his teaching duties, but, steadfastly abiding by his principles, whether religious (Quakers are doctrinally opposed to war) or political in nature, he came to school wearing an armband on December 12, the second moratorium day. He was summarily suspended as soon as Brown learned that James again had worn an armband. Here, too, the record

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(footnote continued):

positions on controversial matters which may reflect on the objectivity of the school." In addition, Brown suggested that it was a breach of professional ethics to use the classroom to promote partisan politics. *See* New York State Teachers Ass'n, Joint Code of Ethics.

[4]The letter in full read:

> The Board of Education of Addison Central School District has conferred with counsel and very thoroughly discussed the facts of your situation. The Board has, unanimously, confirmed the action of District Principal Edward J. Brown regarding your suspension on Friday, November 14, 1969.
>
> The Board deems your action to be a political act. As such, it is prohibited in the School. It is, also, deemed unethical action on the part of a teacher to engage in such activity.
>
> You may return to class on Monday, November 17, 1969, with the understanding that you engage in no political activities while in the School.
>
> Of course, the Board recognizes fully your absolute right to express outside of the School any beliefs that you may have.

is barren of a scintilla of evidence indicating that there were any incidents or threats to school discipline, that any students or teachers had complained of or were offended by James's first or second symbolic protest, or that the armband constituted more than a silent expression of James's own feelings. On January 13, however, without affording James a hearing, the Board of Education of Central District No. 1 discharged him from his teaching position in accordance with §3013(1) of the Education Law of New York.[5]

James appealed his dismissal to the New York State Commissioner of Education, Ewald B. Nyquist, asserting that his dismissal infringed upon his first amendment rights and deprived him of due process of law.[6] The "hearing" before the Commissioner, as we were informed at the argument of this appeal, was no more than an informal round-table discussion between the Commissioner, the parties and their attorneys. No transcript of the proceedings was made. On September 23, 1970, Commissioner Nyquist filed his decision. Although he recognized that a board of education does not have unfettered discretion to dismiss a probationary teacher,[7] he concluded that James had violated "sound educational principles"

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[5]James, in his first year of teaching at Addison, was appointed as a "probationary" teacher. Under the provisions of §3013(1) of the Education Law of New York, the services of a probationary teacher "may be discontinued at any time during such probationary period, upon the recommendation of the district superintendent, by a majority vote of the board of education or trustees."

[6]*See* Education Law of New York §310.

[7]Commissioner Nyquist relied on his earlier decision in *Matter of Collins*, Decision No. 8051, August 26, 1969:

> While I fully agree that a board of education has broad powers over a probationary teacher and may dismiss a probationer without giving a reason, the exercise of these powers by a board must be made "within

and that his actions "were not constitutionally protected." In addition, he reaffirmed the Board of Education's absolute right to dismiss a probationary teacher without affording the teacher a hearing or explaining the basis of the discharge.

Thereupon, James instituted this action in the Western District of New York against the Board of Education of Central District No. 1, Edward Brown, Carl Pillard and Robert Andrews, President of the School District Board of Trustees, alleging that his dismissal violated 42 U.S.C. §1983.[8] Judge Burke, in a brief memorandum, denied James's motion for summary judgment and granted the defendants' motion for a judgment, summarily dismissing the complaint on the merits, seemingly on two grounds: first, that the issues raised by the complaint were *res judicata*, and second, that none of James's federally protected rights was violated.[9]

(footnote continued):

> the ambit of the purpose for which they were granted and in a manner consistent with our basic Constitutional framework."

See also Puentes v. Board of Education, 24 N. Y. 2d 996 (1969), *rev'g* 24 A. D. 2d 628 (1966).

[8] 42 U.S.C. §1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

James's complaint asserts violations of his rights to free speech, free exercise of religion, procedural due process and equal protection of the laws.

[9] In this posture of the proceedings, we must accept all factual allegations in the complaint as true.

I.

At the outset we are presented with the contention that the claims asserted below are *res judicata*. We consider this to be wholly without merit. Appellees argue that James, at his own choosing, was given the full opportunity to litigate his claims before the Commissioner of Education, a "judicial officer" of the State, and therefore that James should be bound by the Commissioner's decision. Judge Burke buttressed their position with a pointed reference to James's failure to appeal the Commissioner's decision to the New York courts.[10]

It is no longer open to dispute that a plaintiff with a claim for relief under the Civil Rights Act, 42 U.S.C. §1983, is not required to exhaust state judicial remedies. See, e. g., *Monroe v. Pape*, 365 U. S. 167 (1961); *Rodriguez v. McGinnis*, —— F. 2d ——, 1971 Slip Op. 1527 (2nd Cir. Jan. 25, 1972) (*en banc*); *Sostre v. McGinnis*, 442 F. 2d 178, 182 (2nd Cir. 1971) (*en banc*), *cert denied*, 404 U. S. 1049 (1972). It is still the law in this Circuit, however, that a Civil Rights plaintiff must exhaust state administrative remedies. *Eisen v. Eastman*, 421 F. 2d 560 (2nd Cir. 1969), *cert. denied*, 400 U. S. 841 (1970). It hardly can be suggested that a plaintiff having followed the course laid out by *Eisen*, was to be barred henceforth from pressing his claim to final judicial review or to be deprived of his opportunity to litigate his constitutional claims in the judicial forum of his choice. To adopt the full implication of appellees' argument would be to effect a judicial repeal of 42 U.S.C. §1983 and strike down the Su-

[10]Although §310 of the Education Law of New York provides that any decision of the Commissioner "shall be final and conclusive, and not subject to question or review in any place or court whatever," New York courts have reviewed decisions where there is a claim that the decision was arbitrary or an abuse of discretion. *See, e.g., Board of Education v. Allen*, 6 N. Y. 2d 127 (1959).

preme Court's decision in *Monroe v. Pape, supra.* James would be placed in the paradoxical position of being barred from the federal courts if he had not exhausted administrative remedies and barred if he had.[11]

II.

We come now to the crucial issue we must decide—did the Board of Education infringe James's first amendment right to freedom of speech?[12]

Any meaningful discussion of a teacher's first amendment right to wear a black armband in a classroom as a symbolic protest against this nation's involvement in the Vietnam War must begin with a close examination of the case which dealt with this question as it applied to a student. *Tinker v. Des Moines Independent Community School District, supra.* Mary Beth Tinker, a junior high school student, her older brother and his friend, both high school students, were suspended from school

[11]Appellees' reliance on Judge Weinstein's opinion in *Taylor v. New York City Transit Authority*, 309 F. Supp. 785 (E.D.N.Y.), *aff'd* 433 F. 2d 665 (2d Cir. 1970), is misplaced. Judge Weinstein's determination that Taylor could not raise his procedural due process claim in the federal courts, after he had appealed his discharge as a Transit Authority employee to the New York City Civil Service Commission and then the New York courts, was based on Taylor's failure to raise that claim before the administrative agency. The decision was nothing more than a logical extension of *Eisen v. Eastman, supra,* through the application of traditional notions of merger and bar. Since no transcript of the proceedings before Commissioner Nyquist was made, James cannot be charged with the failure to raise any of his claims. Suffice it to say that appellees conceded at oral argument that the broad range of James's grievances were discussed informally before the Commissioner.

[12]In view of our decision, it is unnecessary to reach the claims that the discharge violated his rights to free exercise of religion and equal protection of the laws.

for wearing black armbands in school to publicize their opposition to the war in Vietnam. Noting that neither students nor teachers "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," 393 U. S. at 506, the Supreme Court held that a school cannot bar or penalize students' exercise of primary first amendment rights akin to "pure speech" without "a showing that the students' activities would materially and substantially disrupt the work and discipline of the school." *Id.* at 513.

With respect to both teacher and student, the responsibility of school authorities to maintain order and discipline in the schools remains the same. The ultimate goal of school officials is to insure that the discipline necessary to the proper functioning of the school is maintained among both teachers and students. Any limitation on the exercise of constitutional rights can be justified only by a conclusion, based upon reasonable inferences flowing from concrete facts and not abstractions, that the interests of discipline or sound education are materially and substantially jeopardized, whether the danger stems initially from the conduct of students or teachers. Although it is not unreasonable to assume that the views of a teacher occupying a position of authority may carry more influence with a student than would those of students *interesse*, that assumption merely weighs upon the inferences which may be drawn. It does not relieve the school of the necessity to show a reasonable basis for its regulatory policies. As the Court has instructed in discussing the state's power to dismiss a teacher for engaging in conduct ordinarily protected by the first amendment: "The problem in any case is to arrive at a balance between the interest of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficency of the public services it performs

through its employees." *Pickering v. Board of Education*, 391 U. S. 563, 568 (1968).[13]

It is to be noted that in this case, the Board of Education has made no showing whatsoever at any stage of the proceedings that Charles James, by wearing a black armband, threatened to disrupt classroom activities or created any disruption in the school. Nor does the record demonstrate any facts "which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities * * *." *Tinker v. Des Moines Independent Community School District*, 393 U. S. at 514. All we can learn from the record is that in the

[13] *Pickering* dealt with the power of the Board of Education to discharge a high school teacher for sending a letter to the local newspaper criticizing the Board and the district superintendent of schools for their fiscal policies. The Board insisted that the letter was disruptive of faculty discipline and would tend to foment "controversy, conflict and dissension" among teachers, administrators and residents of the district. The Court held that the Board had violated the teacher's first amendment rights. Appellees would distinguish *Pickering* by having us draw an arbitrary line between first amendment rights exercised in school and out of school. The distinction is deceptively simple and cannot withstand scrutiny. *See Goldwasser v. Brown*, 417 F. 2d 1169 (D.C. Cir.), *cert. denied*, 397 U. S. 922 (1969) (*Pickering* test applies to teacher's classroom speech at Air Force language school). Appellees concede, as they must, that James has a constitutional right to wear a black armband off school premises—every day if he so pleases. But, it is not unreasonable to assume that James, as a teacher, might gain notoriety for such out-of-school conduct and become a vanguard of the local opposition to the Vietnam War. In that event, one could not divorce his person from the idea, and he would become an embodiment of his symbolic protest no matter where or how he appeared—even if temporarily without his armband. Although we can imagine situations in which a teacher would be so controversial because of his tenets or beliefs that he would be a disruptive force in the school, no one would suggest that he could be dismissed merely because he was *identified* with a particular cause if he did not preach that cause in class.

opinion of Edward Brown, the District Principal, "wearing the armband would tend to be disruptive and would possibly encourage pupils to engage in disruptive demonstrations." "But," the Supreme Court warned in *Tinker*, "in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression."[14] *Id.* at 508.

Appellees urge us not to conclude that schools must wait until disruption is on the doorstep before they may take protective action. We do not suggest this course, but if anything is clear from the tortuous development of the first amendment right, freedom of expression demands breathing room. To preserve the "marketplace of ideas" so essential to our system of democracy, we must be willing to assume the risk of argument and lawful disagreement. *Id.* at 508-09; *Terminiello v. Chicago*, 337 U. S. 1 (1949). This is entirely different, however, from saying that the school must await open rebellion, violence or extensive disruption before it acts. *Compare Burnside v. Byars*, 363 F. 2d 744 (5th Cir. 1966), *with Blackwell v. Issaquena County Board of Education*, 363 F. 2d 749 (5th Cir. 1966).[15]

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[14]The facts here call more clearly for the protection of James's rights than did those in *Tinker*. In his dissenting opinion in *Tinker*, Justice Black emphasized that "[e]ven a casual reading of the record shows that the armband did divert students' minds from their regular lessons, and that talk, comments, etc., made John Tinker 'self-conscious' in attending school with his armband." 393 U. S. at 518. The record in this case does not support similar inferences.

[15]In *Burnside v. Byars*, the Fifth Circuit ordered that school authorities be enjoined from enforcing a regulation against wearing freedom buttons when there was no evidence of disruption. The same panel of the Fifth Circuit on the same day in *Issaquena* upheld a similar regulation in another school because students wearing the buttons had attempted to force unwilling students to wear the buttons. When the offending students were ordered to remove their buttons and cease distributing them in school, they engaged in disruptive activities.

III.

That does not end our inquiry, however. The interest of the state in promoting the efficient operation of its schools extends beyond merely securing an orderly classroom. Although the pros and cons of progressive education are debated heatedly, a principal function of all elementary and secondary education is indoctrinative—whether it be to teach the ABC's or multiplication tables to transmit the basic values of the community. "[S]ome measure of public regulation is inherent in the very provision of public education." Note, *Developments in the Law-Academic Freedom*, 81 Harv. L. Rev. 1045, 1053 (1968). Accordingly, courts consistently have affirmed that curriculum controls belong to the political process and local school authorities. "Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate constitutional values." *Epperson v. Arkansas*, 393 U. S. 97, 104 (1968).[11]

Appellees argue that this broad power extends to controlling a teacher's speech in public schools, that "assumptions of the 'free marketplace of ideas' on which freedom of speech rests do not apply to school-aged children, especially in the classroom where the word of the teacher may carry great authority." Note, *Developments in the Law-Academic Freedom*, 81 Harv. L. Rev. at 1053. Certainly there must be some restraints because the students are a "captive" group. But to state the proposition without

[11]Even in this area there are constitutional limitations. In *Epperson*, for example, the Court held that a state could not prevent a high school biology teacher from teaching students about Darwin's theory of evolution because the regulation would be an establishment of religion in violation of the first amendment. Nor can a state prevent the teaching of modern foreign languages under the guise of promoting "civic development." *Meyer v. Nebraska*, 262 U. S. 390 (1923).

qualification is to uncover its fallacy. More than a decade of Supreme Court precedent leaves no doubt that we cannot countenance school authorities arbitrarily censoring a teacher's speech merely because they do not agree with the teacher's political philosophies or leanings. This is particularly so when that speech does not interfere in any way with the teacher's obligations to teach, is not coercive and does not arbitrarily inculcate doctrinaire views in the minds of the students. *Cf. Keyishian v. Board of Regents, supra.*

As we have indicated, there is merit to appellees' argument that *Tinker* does not control this case, because a teacher may have a far more pervasive influence over a student than would one student over another. Although sound discussions of ideas are the beams and buttresses of the first amendment, teachers cannot be allowed to patrol the precincts of radical thought with the unrelenting goal of indoctrination, a goal compatible with totalitarianism and not democracy. When a teacher is only content if he persuades his students that his values and only his values ought to be their values, then it is not unreasonable to expect the state to protect impressionable children from such dogmatism. But, just as clearly, those charged with overseeing the day-to-day interchange between teacher and student must exercise that degree of restraint necessary to protect first amendment rights. The question we must ask in every first amendment case is whether the regulatory policy is drawn as narrowly as possible to achieve the social interests that justify it, or whether it exceeds permissible bounds by unduly restricting protected speech to an extent "greater than is essential to the furtherance of" those interests. *See United States v. O'Brien*, 391 U. S. 367, 377 (1968). Thus, when a teacher presents a colorable claim that school authorities have infringed on his first amendment rights and arbitrarily transgressed on these transcendent values, school authorities must demonstrate

a reasonable basis for concluding that the teacher's conduct threatens to impair their legitimate interests in regulating the school curriculum. What we require, then, is only that rules formulated by school officials be reasonably related to the needs of the educational process and that any disciplinary action taken pursuant to those rules have a basis in fact.

Several factors present here compel the conclusion that the Board of Education arbitrarily and unjustifiably discharged James for wearing the black armband.[17] Clearly, there was no attempt by James to proselytize his students.[18] It does not appear from the record that any student believed the armband to be anything more than a benign symbolic expression of the teacher's personal views.

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[17]In light of our holding, we find it unnecessary to decide whether the Board of Education violated James's due process rights by not affording him an evidentiary hearing before he was dismissed. *Compare Roth v. Board of Regents*, 446 F. 2d 806 (7th Cir.), *cert. granted*, 404 U. S. 909 (1971), *and Sindermann v. Perry*, 430 F. 2d 939 (5th Cir. 1970), *cert. granted*, 404 U. S. 917 (1971) (a probationary teacher has a right to a hearing when he has a colorable claim that his dismissal violates the first amendment), *with Parker v. Board of Education*, 348 F. 2d 464 (4th Cir. 1965) (a probationary teacher has no constitutional right to a hearing when his contract is not renewed). *See also Drown v. Portsmouth School District*, 435 F. 2d 1182, 1188 (1st Cir. 1970), *cert. denied*, 402 U. S. 972 (1971); *Orr v. Trinter*, 444 F. 2d 128, 135 (6th Cir. 1971), *petition for cert. filed*, 40 U.S.L.W. 3126 (Aug. 18, 1971); *Shirck v. Thomas*, 447 F. 2d 1025, 1026 (7th Cir. 1971), *petition for cert. filed*, 40 U. S.L.W. 3321 (Dec. 3, 1971), 40 U.S.L.W. 3375 (Jan. 21, 1972); *Note*, 85 Harv. L. Rev. 1327 (1972). The Supreme Court has heard argument in both *Roth* and *Sindermann*, and its decision may well be dispositive of this issue.

[18]Appellees argue that James's political activity was unacceptable in the classroom because the armband was "the projection of an idea • • • it asks no comments in return and it invites no discussion." This fact alone cannot condemn a protected medium of expression.

Moreover, we cannot ignore the fact that James was teaching 11th grade (high school) English. His students were approximately 16 or 17 years of age, thus more mature than those junior high school students in *Tinker*.

Recently, this country enfranchised 18-year-olds.[19] It would be foolhardy to shield our children from political debate and issues until the eve of their first venture into the voting booth. Schools must play a central role in preparing their students to think and analyze and to recognize the demagogue. Under the circumstances present here, there was a greater danger that the school, by power of example, would appear to the students to be sanctioning the very "pall of orthodoxy," condemned in *Keyishian*, which chokes freedom of dissent.[20]

Finally, James was first removed from class while he was teaching poetry. There is no suggestion whatsoever that his armband interfered with his teaching functions, or for that matter, that his teaching ever had been deficient in any respect.[21]

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[19]Eighteen-year-olds, in addition, are now eligible to serve on federal juries. Pub. L. No. 92-269 (Apr. 6, 1972).

[20]*See Hanover v. Northrup*, 325 F. Supp. 170 (D. Conn. 1970) (violation of first amendment rights to dismiss a junior high school teacher who refused to lead her class in the Salute to the Flag because she believed the phrase "with liberty and justice for all" was an untrue statement).

[21]Appellees rely extensively on *Goldwasser v. Brown*, *supra*, which is clearly inapposite. Goldwasser, a civilian, was employed as a language instructor in the Air Force Language School to teach English to foreign military officers. After repeated warnings against discussing controversial subjects during class hours, he was discharged for antiwar statements and comments about anti-Semitism in America. In upholding the dismissal in the face of a first amendment challenge, the court relied on findings that his conduct interfered with the proper performance of his duties because he unduly sacrificed classroom teaching hours. 417 F. 2d at 1176-77.

IV.

We emphasize that we do not question the broad discretion of local school authorities in setting classroom standards, nor do we question their expertise in evaluating the effects of classroom conduct in light of the special characteristics of the school environment. The federal courts, however, cannot allow unfettered discretion to violate fundamental constitutional rights.[22] Professor Jaffe put it aptly in an analogous area of the federal courts' review power: "* * * expertness is not a magic wand which can be indiscriminately waved over the corpus of an agency's findings to preserve them from review." L. Jaffe, Judicial Control of Administrative Action 613 (1965). We cannot abdicate our responsibility to form our own conclusions when, having thoroughly searched the record, we find no sound constitutional basis for the Board's or the Commissioner's conclusions.

The dangers of unrestrained discretion are readily apparent. Under the guise of beneficent concern for the welfare of school children, school authorities, albeit unwittingly, might permit prejudices of the community to prevail. It is in such a situation that the will of the transient majority can prove devastating to freedom of expression. Indeed, James has alleged in his complaint that another teacher, "without incurring any disciplinary sanction, prominently displayed the slogan 'Peace with Honor' on a bulletin board in his classroom." This slogan

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[22]The Supreme Court decision in *Tinker* instructs that the federal courts must not accept unquestionably the school authorities' judgment as to the effects of classroom conduct or speech. *See*, Note, *The Supreme Court, 1968 Term*, 83 Harv. L. Rev. 7, 158 (1969): "By not deferring to the administrative expertise of school officials, *Tinker* imposes new limitations on the power of the state to restrain students from speech or conduct which would clearly be protected by the first amendment if engaged in by adults."

has been associated with our foreign policy. If the allegation is true, and we must assume that it is in light of the summary dismissal of the complaint, it exemplifies the concern we have expressed. The Board's actions under such circumstances would indicate that its regulation against political activity in the classroom may be no more than the fulcrum to censor only that expression with which it disagrees. See *Tinker v. Des Moines Independent Community School District*, 393 U.S. at 510-511 (petitioners were barred from wearing black armbands but other students were allowed to wear political campaign buttons and the Iron Cross, a traditional symbol of Nazism). By requiring the Board of Education to justify its actions when there is a colorable claim of deprivation of first amendment rights, we establish a prophylactic procedure that automatically tempers abuse of properly vested discretion.

It is characteristic of resolutions of first amendment cases, where the price of freedom of expression is so high and the horizons of conflict between countervailing interests seemingly infinite, that they do not yield simplistic formulas or handy scales for weighing competing values. "The best one can hope for is to discern lines of analysis and advance formulations sufficient to bridge past decisions with new facts. One must be satisfied with such present solutions and cannot expect a clear view of the terrain beyond the periphery of the immediate case." *Eisner v. Stamford Board of Education*, 440 F. 2d 803, 804 n. 1 (2d Cir. 1971).

It is appropriate, however, lest our decision today (which is based on the total absence of any facts justifying the Board of Education's actions) be misunderstood, that we disclaim any intent to condone partisan political activities in the public schools which reasonably may be expected to interfere with the educational process.

Accordingly, we conclude that the district court erred. The judgment of the district court is reversed and the case remanded for proceedings not inconsistent with this opinion.

Opinion of the United States District Court.

UNITED STATES DISTRICT COURT,

WESTERN DISTRICT OF NEW YORK.

CHARLES JAMES,

Plaintiff,

vs.

THE BOARD OF EDUCATION OF CENTRAL DISTRICT NO. 1 OF THE TOWNS OF ADDISON, CAMERON, RATHBONE, TUSCARORA, WOODHULL, THURSTON, ERWIN, LINDLEY and CANISTEO; STEUBEN COUNTY, NEW YORK; EDWARD J. BROWN, District Principal, Central School District No. 1; CARL PILLARD, Principal, Addison High School and ROBERT ANDREWS, President of the Board of Trustees of Central District No. 1,

Defendants.

Civil 1971-164

Burt Neuborne, Jeremiah S. Gutman, Herman Schwartz and Harrop Freeman, % New York Civil Liberties Union, 84 Fifth Avenue, New York, N. Y. 10011, Attorneys for Plaintiff.

Harry Treinin, 11 East Market Street, Corning, N. Y. 14830, Attorney for Defendants.

Commissioner of Education of New York, *Amicus Curiae*, Robert D. Stone and John P. Jehu, State Education Building, Albany, N. Y. 12224 (of counsel).

The defendants by their written motion filed August 20, 1971, move to dismiss the complaint upon grounds particularly stated therein, and for judgment on the pleadings; and for summary judgment in their favor. The plaintiff filed his affidavit sworn to September 27, 1971 in opposition. The matter came on for argument September 27, 1971. Upon due consideration summary judgment is hereby granted to the defendants as follows: It is hereby

ORDERED, ADJUDGED and DECREED as follows: The plaintiff appealed to the Commissioner of Education of the State of New York from the action of the Board of Education of Central School District No. 1 of the Towns of Addison, Cameron, Rathbone, Tuscarora, Woodhull, Thurston, Erwin, Lindley and Canisteo; Steuben County, relating to his dismissal. The Commissioner of Education by decision and order dated September 29, 1970, dismissed the appeal, holding in conclusion "Since the actions of the appellant were contrary to sound educational principles, and since those actions were not constitutionally protected in the circumstances of this appeal, the action of the respondent in terminating appellant's probationary appointment must be sustained." The plaintiff did not appeal, as he had the right to do, but instead brought this action. The questions raised by the complaint in this action are *res judicata*. The plaintiff in wearing the black arm band in the classroom was effectively presenting only one side of an important political issue. In so doing he chose to ignore the expressed policy of the State Education Department calling for neutrality and objectivity in dealing with "Moratorium Days" on the part of teachers and administrators. These were days of intense political feeling on the question of the policy of the Administration in reference to its conduct of the Viet Nam War. His actions in this respect

amounted to insubordination. His actions were not constitutionally protected. Plaintiff's dismissal did not violate his rights under the First Amendment of the Federal Constitution, nor any of his federally protected rights. He was not entitled to a hearing prior to his dismissal. The complaint is dismissed on the merits.

HAROLD P. BURKE
United States District Judge

December 22, 1971.

Letter, Filed With the Circuit Court on Behalf of Commissioner of Education, State of New York.

June 9, 1972

Hon. Henry J. Friendly
Chief Judge
United States Court of Appeals
United States Court House
Foley Square
New York, New York 10007

Re: James v. Board of Education *et al.*
Docket No. 72-1109
Cal. No. 697

Dear Judge Friendly:

This letter is written on behalf of the New York State Commissioner of Education who has appeared throughout as *amicus curiae* in the above entitled matter.

We urgently support the petition for a rehearing *in banc* which has been or will be filed by the board of education of the Addison Central School District, Steuben County, New York, Appellees.

We strongly feel that the decision of the Court, rendered May 24, 1972, is directly contrary to sound educational principles and will have serious adverse effects on the New York State school system. It is directly contrary to the Code of Ethics adopted jointly by both the New York State School Boards Association and the New York State Teachers Association, and directly contrary to specific directives issued to all school districts by the New York State Education Department.

It is our view that this decision would open the door to political indoctrination in the State's classrooms.

When the Court says:

> "There is no suggestion whatever that his [James'] armband interfered with his teaching functions * * *."

and

> "It is appropriate, however, lest our decision today (which is based on the total absence of any facts justifying the board of education's actions) be misunderstood, that we disclaim any intent to condone partisan political activities in the public schools *which reasonably may be expected to interfere with the educational process.*" (Italics supplied.)

it is clear that the Court misapprehended the nature of the educational process. It is exactly the act of (1) teaching only one of several views of a highly controversial subject and (2) teaching in a field in which he has no demonstrated competence which does, in and of itself, interfere with the educational process, which is the heart of the problem here.

We are deeply disturbed by the holding throughout the decision that only "disruption" and "incidents or threats to school discipline" can be a proper basis for action by a board of education. It is the teaching function itself with which we are concerned rather than any question of discipline or possible disruption. It is submitted that such an approach would divest boards of education of control over the very core of their functions.

We are, further greatly disturbed over the Courts sanctioning a procedure where a State *judicial* tribunal (see New York Education Law sections 310, 207) renders a judicial decision, based on the filing and service of pleadings, memoranda of law and an oral argument

(characterized inaccurately by the Court "as we were informed at the argument of this appeal" as "no more than an informal round-table discussion between the Commissioner, the parties and their attorneys"), and the same petitioner, represented by the same counsel ignoring such procedure and decision, proceeds *de novo* in the Federal Court. It is submitted that from the standpoint of proper Federal judicial procedure and jurisdiction, such a decision may not be collaterally attacked in such fashion. Either the petitioner should seek to review the Commissioner's decision in the State Courts and then appeal from them to the United States Supreme Court; or the petitioner should seek review of the decision directly in the Federal Courts. In either case the record, on the basis of which the Commissioner's decision was rendered, would be before the Court. To sanction such an improper approach to the judicial function would have a chilling effect on any use of any State procedures, and ignores the fundamental principle of *res judicata*.

We are, finally, greatly disturbed by the repeated references by the Court to wholly nonexistent facts for which there is no basis whatever in the record. The Court says:

> "We cannot countenance school authorities arbitrarily censoring a teacher's speech *merely because they do not agree with the teacher's political philosophies or learnings.*"

There is not one scintilla of evidence in the record to support such a statement. In fact, it is our understanding that both the board of education and the administration are divided on these issues, and it is for this very reason—to be sure that the students will not be proselytized one way *or the other* but will be given the whole picture, with all sides explained in the class and

at the time when the subject is properly reached for discussion—that strict neutrality was and is required of teachers by the board of education.

When the Court says:

> "Clearly, there was no attempt by James to proselytize his students,"

we can only ask for what other reason he could possibly have worn the armband *to class?*

It can hardly be maintained that limiting an English class to the teaching of English or a mathematics class to the teaching of mathematics, imposes a "pall of orthodoxy" on the students.

Nor can such a "pall of orthodoxy" be found where a school insists that students be *acquainted with all sides* of a given subject, and only by the teacher charged with, prepared for, and expert in, the subject involved, whatever it may be.

"Free public education, if faithful to the ideal of secular instruction and political neutrality, will not be partisan or enemy of any class, creed, party, or faction." (*West Virginia v. Barnette*, 319 U. S. 624, 637.)

We think the Court went far afield indeed when it said:

> "* * * as far as we know [James' armband] *did not have any influence on any students* and did not engender protests from any student, teacher or parent." (Italics supplied.)

For one thing the record is wholly devoid of evidence on this question, and, more importantly, since students are told to look up to, emulate, and be guided by their teachers, the influence of such expressions of political views of teachers on students is almost impossible to gauge especially within the confines of a lawsuit. This

is particularly true where no opportunity for discussion exists—the subject of the teacher lying in other fields.

For all the foregoing reasons, *amicus curiae* respectfully supports the motion of appellees for a rehearing *en banc*.

Respectfully,

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